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Supreme Court, U.S.
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No. 98-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARILYN PONA,
Petitioner,

v.

CECIL WHITTAKER'S INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT CECIL WHITTAKER'S INC.'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

LOUIS GILDEN
Attorney for Respondent
CECIL WHITTAKER'S INC.
611 North 10th Street, Suite 300
St. Louis, Missouri 63101
314-241-6607

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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PARTIES TO THE PROCEEDING

Marilyn Pona is the appellant and is represented by Jerome J. Dobson, Attorney at Law, in this proceeding.

Cecil Whittaker's, Inc. is a respondent and is represented by Louis Gilden, Attorney at Law in this proceeding.

C.W. Central Westend, Inc; Eye's Enterprises, Inc.; Paul Lia, as Trustee of Eye's Enterprises, Inc.; Paul Lia, In His Individual Capacity; Ralph Lia, as Trustee of Eye's Enterprises, Inc., Ralph Lia, In His Individual Capacity; Jim Craddock, as Trustee of Eye's Enterprises, Inc., Jim Craddock, In His Individual Capacity, to this respondent's knowledge are not parties to this proceeding.

City of St. Louis Board of Police Commissioners; Ann Marie Clarke, Member of the City of St. Louis Board of Police Commissioners; Matthew J. Padberg, Member of the City of St. Louis Board of Police Commissioners; Robert Haar, Member of the City of St. Louis Board of Police Commissioners; Freeman Bosley, Jr., Member of the City of St. Louis Board of Police Commissioners; Charles Mischeaux, Member of the City of St. Louis Police Board of Commissioners; Michael Calcaterra, In His Individual Capacity and as a Police Officer for the City of St. Louis; Matthew Rodden, In His Individual Capacity and as a Police Officer for the City of St. Louis; and Joseph Robinson, In His Individual Capacity and as a Police Officer for the City of St. Louis are respondents and represented by Judith A. Ronzio, Attorney at Law in this proceeding.

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JURISDICTION

Petitioner filed an application for an extension of time to file a petition for Writ of Certiorari. The petition was presented to Justice Thomas, who on February 17, 1999 extended the time to and including March 23, 1999. (Application No. A-673)

STATUTORY PROVISIONS

42 U.S.C. § 12182
(a) General Rule

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Mo. Rev. Stat. § 213.065
Discrimination in public accommodations prohibited, exceptions

> 1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

CONSTITUTIONAL PROVISION

Article 3, Section 2
United States Constitution

Section 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions as under such Regulations as the Congress shall make.

REASONS FOR DENIAL OF THE WRIT

I

FAILURE TO COMPLY WITH RULE 14

Petitioner has failed to comply with Rule 14 of this Court in the following respects:

1. As required by Rule 14.1(b), Petitioner has failed to list all of the parties to the proceedings in this Court whose judgment is sought to be reviewed by Petitioner.

2. As required by Rule 14.1(e)(ii), Petitioner has failed to include the date and terms of the order granting an extension of time to Petitioner to file her petition for a writ of certiorari.

3. As required by Rule 14.1(i)(i) and (ii), Petitioner has failed to include in her Appendix, the Order on Summary Judgment made by the District Court dated November 18, 1996 (Brief Pet. p. 8)[1]. There were two (2) summary judgments entered by the District Court, one as to Cecil Whittaker's, Inc. Respondent, on November 18, 1996 (A. 132 - 146)[2], and the other as to the police Respondents on July 1, 1997 (A. 267 - 284). These two judgments entered by the District Judge relate to the judgments sought to be reviewed here.

4. The Petitioner incorrectly states that two judges voted to affirm the judgment of the District Court (Brief Pet. p.8.), when in fact, all three of the judges concurred in affirming the Summary Judgment granted to Cecil Whittaker's, Inc. by the District Court.

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[1] Reference to page of petitioner's brief (Brief Pet. p. __)

[2] Reference to Appendix in Appeals Court (A. __)

5. By the failure of Petitioner to include in the Appendix the Order on Summary Judgment relating to Cecil Whittaker's, Inc., the misstatement of the number of summary judgments that the District Court ruled on affecting the parties to this proceeding, and the failure of Petitioner to identify and isolate the issue as to each defendant affected by the litigation, except to say "defendants" (Brief Pet. p.8), the Petitioner has failed to present with accuracy, brevity and clarity whatever is essential for the Court to ready an adequate understanding of the points requiring consideration, and thus is sufficient reason for the Court to deny the petition in accordance with Rule 14.4.

II

FAILURE TO COMPLY PROMPTLY WITH RULE 12.3

Petitioner has failed to promptly notify the Respondent of the date of filing of the Petition For a Writ of Certiorari and the date the case was placed on the docket as required by Rule 12.3. The mailing date by counsel for Petitioner to counsel for Respondent was April 8, 1999 and received by Respondent's counsel on April 9, 1999, for a brief due on April 25, 1999.

III

THE ONLY QUESTION PRESENTED BY PETITIONER FOR REVIEW THAT MAY IN A REMOTE WAY APPLY TO CECIL WHITTAKER'S, INC., RESPONDENT, IS QUESTION 2

The question presented by Petitioner,

> Is Denial of Admittance To A Service Animal A Denial Of Meaningful Access To A Person With A Disability?

was not an issue involving this respondent in the Appeals Court. Judge Morris Arnold solely suggested that he doubted that the facts would support a finding that Ms. Pona was denied service

at the pizzeria because of her handicap, that it was her dog, not Petitioner, to which the pizzeria employee raised objection. This comment was made in point IV of the opinion which related to the state discrimination in public accommodations law, Missouri Revised Statute §213.065. Essentially, the only people who would be affected by Question 2 are the defendants, Paul Lia and Eye's Enterprises, Inc. since they were the operators of the pizzeria, and they were dismissed from the litigation because Petitioner had not perfected her default judgments granted by the Court. The discussion in Point IV was made after the Appeals Court unanimously held in Point I under Title III of the ADA, 42 U.S.C. §12182 (a), Cecil Whittaker's, Inc. was a franchisor, and that under its franchise agreement, it reserved no right to control entry into the pizzeria, and that it did not own, lease or operate the pizzeria, and therefore could not be held liable under the ADA. The Appeals Court also held that there was nothing in the record which would indicate that Cecil Whittaker's, Inc. did anything to give customers the impression that it controlled access to the building.

Under the ADA, the Appeals Court unanimously sustained the District Court's grant of summary judgment to Cecil Whittaker's, Inc. In so doing, the District Court and the Appeals Court both cited *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, (5th Cir. 1995), *cert. denied*, 516 U.S. 1045, 133 LEd.2d 660, 116 S. Ct. 704 (1996) as authority. The *Neff* case is in accord with the *Pona* decision, and there are no Circuits to the contrary. Thus, there are no splits in the Circuits.

Only Judge Morris Arnold of the Appeals Court made a comment in Point IV of the opinion:

> [I] doubt that the facts would support a finding that Ms. Pona was denied service at the pizzeria "on the grounds of handicap." It was her dog, not Ms. Pona herself to which the pizzeria employee raised objection.

Judge Morris Arnold, however, continued his statement by restating his legal finding:

> Passing over that point, however, I believe for the reasons already indicated that CW did not deny Ms. Pona anything, because, as I have said, it had no right to control the premises under the franchise agreement.

Petitioner states that its question presented was an alternative ground[3] given to reject Petitioner's discrimination claim by one Judge of the Appeals Court Panel. Judge Morris Arnold did not say that it was an alternative ground, and Judge Owen M. Panner commented on Judge Morris Arnold's comment as a suggestion that he didn't agree with. Petitioner has not attacked the unanimous decision of the panel that Cecil Whittaker's, Inc. did not control entry into the pizzeria, and that it did not own lease or operate the pizzeria as the franchisor, which is the basic finding of law in Point I, and which is also the unanimous decision of the Appeals Court as to the state public accommodations law in Point IV of the opinion.

Further Petitioner has in no way stated to this Court the principal finding of no liability by the Appeals Court on the part of Cecil Whittaker's, Inc., under the ADA and under state law by its status as a mere franchisor with no control over the entry into the pizzeria, and that it did not own, lease, or operate the pizzeria and therefore was not liable.Essentially, Petitioner is asking this Court for an advisory opinion on a question, which is not the core of the judicial finding in favor of this respondent, and which at this time affects no party in this current litigation.

If the Court accepts this "alternative" for review, the Court would have accepted for consideration a comment or suggestion in the opinion, which comment is rendered unnecessary by the

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[3] Brief Pet. p. 12

balance of the decision. Respondent here is not liable as a franchisor, and the defendants who may be culpable have been dismissed from the litigation, because Petitioner did not perfect the default judgments granted her by the Court. A review of this question would be meaningless, for none of the current Respondents are affected by this comment. This Court has stated that it reviews judgments not statements in opinions. *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726, 734, 57 L.Ed.2d 1073, 98 S. Ct. 3026 (1978). A Court's musings about how a case might have been decided, would be the rendering of an advisory opinion in violation of the constitutional stricture. *U.S. Const. art. 3 §2; Environmental Defense Fund v. Alexander,* 614 F.2d 474, 480 (5th Cir. 1980). If this Court accepts certiorari as to Question 2, it would thus have accepted a question based on a perceived misstatement of the law, Rule 15.2.

V

On July 1, 1997, the same day that District Court granted partial summary judgment to all of the police commissioners and the police officers in their individual and official capacities, the District Court informed Petitioner to file an appropriate motion within 30 days for a default judgment against defendants Eye's Enterprises, Inc. and Paul Lia, supported by all necessary affidavits and other documentation and accompanied by a proposed default judgment (JA 354)[4]. However, Petitioner on August 14, 1997 instead filed a notice of appeal to the Appeals Court. On August 21, 1997, the District Court ordered a dismissal of the action with prejudice against Eye's Enterprises, Inc. and Paul Lia because plaintiff had not complied with the court's order of July 1, 1997 (JA 361).

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[4] Joint Appendix in Appeals Court (JA __)

As Judge Panner stated under Title III of the ADA a private plaintiff can obtain only injunctive relief not the compensatory and punitive damages that Petitioner seeks. *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034, 1039 (8th Cir. 1998). Under the District Court's Order, Petitioner could have obtained the injunctive relief she may be lawfully entitled to against the two defendants in default, but instead chose to abandon her right to this relief and permitted the two defendants in default to be dismissed. If the Court accepts this case, the Court would have before it a Petitioner who abandoned the basic equity relief she may have been entitled to by the actions of the dismissed defendants. Petitioner has apparently called the defendants in default "scofflaws, who ran the public accommodation," (Brief Pet. p. 26), and yet she has abandoned the judicial relief available to her, and had not sought relief against them in the Appeals Court.

VI

With respect to Question 3, Petitioner highlights its argument to the question by reference to a new "KKK" which has no pertinency in any way to this case, and Petitioner is overreaching to gather attention by referencing KKK initials to District Judge Owen M. Panner's reasoning.

It is noteworthy that Judge Panner instead of expressing any language in the opinion which would inspire the use of the hated "KKK"initials, expressed the opinion that the police, by its policy, did not discriminate against anyone in public accommodations, for they acted in a neutral posture, did not take sides, and preferred to have the matter handled through civil proceedings, and have the police advise people of their right to initiate such an action.

IV

CONCLUSION

For the reasons given above, and for those given by Respondents police and police board in their brief in opposition, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LOUIS GILDEN
Attorney for Respondent
Cecil Whittaker's, Inc.
611 North 10th Street, Suite 300
St. Louis, Missouri 63101
(314) 241-6607; FAX - (314) 241-6608